Supreme Court, U.S.
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Supreme Court of the United States

EMILE B. MAALOUF
d/b/a CHICAGO INTERNATIONAL NETWORK,

Petitioner.

v.

CITIGROUP GLOBAL MARKETS, INC.
f/k/a SALOMON SMITH BARNEY, INC.

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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Petitioner-pro se

QUESTIONS PRESENTED

The U.S.C.A. 2nd Circuit upheld the lower court's decision that Maalouf's two claims of breach of contract have prevailed against Citigroup arising out of the Alrosa $500 million and the Gazprom $1.2 billion Eurobond transactions. However, the Circuit court erroneously upheld the decision of the lower court to deny Maalouf his demand to a jury trial to dispose of the claims.

1. Whether the decision by the lower court judges to preclude a trial by jury in the presence of a factual and substantial dispute, constituted an abuse of discretion and rendered the Seventh Amendment's Constitutional right to a jury irrelevant.

2. If a Petitioner provides evidence of premeditated concealment and systematic cover-up of a contract breach by Respondent's conspirators, whether such a cover-up is considered a standard breach of contract, or it constitutes a tort claim of fraud or at minimal bad faith and unfair dealing.

In response to Petitioner's demand to depose a crucial witness, the trial judge ordered in open court that James Dimon the former president of Salomon Smith Barney would be deposed by Petitioner, only if he answers yes to two written interrogatories drafted by the judge. The Second Circuit has not addressed Maalouf's question related to the above, despite presenting evidence of Dimon's knowledge of the issues, which contradicted his negative answers.

3. Whether a prior indirect warning by the trial judge of a looming deposition if the witness answered yes to an interrogatory, would influence the witness' answers, and would prejudice the claimant and diminish the value of discovery.

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OPINION BELOW

The November 28, 2005, summary order of the Court of Appeals for the Second Circuit is reprinted in this Petition for Writ of Certiorari (App. 1a-4a). The Court of Appeals denied rehearing and rehearing on banc dated August 14, 2006 is reprinted in (App. 5a). The opinion of the District Court of the Southern District of New York is transcribed from the original format in (App. 6a-27a) and is reported as *Maalouf v. Salomon Smith Barney, Inc.* The Derived Judgment of the District Court is reprinted in(App.28a-29a).

JURISDICTION

The Court of Appeals entered its judgment on November 28, 2005. (App. 1a-4a). Petitioner Emile B. Maalouf ("Maalouf") timely filed a petition for rehearing and rehearing en banc, which was denied on August 14, 2006. (App. 5a). This Court has jurisdiction under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., VII Amend.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

This case is one of a classic example of how a smaller entity can be railroaded by the violations and overreach of a much larger one, regardless of the written legal agreements and restrictions placed upon the larger entity. The harm caused is especially compounded when the court erroneously places unreasonable barriers to a claimant's constitutional rights after years of litigation, by preventing the injured party from a proper discovery and denying the injured its right to its day in court in the presence of a jury.

Plaintiff-Petitioner Emile B. Maalouf d/b/a Chicago International Network ("CIN") respectfully petitions for a Writ of Certiorari, which involves questions of legal rights, constitutional rights, judicial abuse of discretion and of exceptional public policy importance. The lower court panel erred in its understanding of the principal issues and incorrectly concluded the outcome in this Case, and its findings conflicted with the established facts and conclusive evidence and departed from the legislative and constitutional boundaries by determining factual matters absent of a jury waiver, and at the entire expense of Petitioner the injured party in this Case.

The claims presented in Plaintiff-Petitioner's Complaint have been largely proven with conclusive evidence uncovered against Defendant-Respondent Citigroup Global Markets, Inc. ("Smith Barney"). In this civil action, Petitioner not only met the threshold of the preponderance of evidence required in a civil action, but demonstrated to the lower Court that the violations against Plaintiff were proven with a more stringent requirement than a civil action, by documenting in the Appeals Court Brief and Appendix that the violations against Plaintiff were committed beyond the reasonable doubt. Yet, despite the conclusive violations against Petitioner, and despite Petitioner's documented several years of work as of 1992, in the costly, difficult and risk laden environment in the former Soviet Union ("FSU"), and despite loosing its entire savings and conservatively over $30 million dollars including initial investment, revenues and equity, and missing out on the largest economic boom in recent history, during the transformation of the FSU, and despite the prevailing breaches arising out of the $500 million Eurobond transaction with Alrosa and the $1.2 billion Eurobond transaction with Gazprom, and despite the direct and consequential harm and the burden caused following several years of disputes since 1997 with Smith Barney pertaining to the breaches of the 1995 and 1996 Agreements, and the ensuing litigations in the federal

courts as of 2002 until present; the Panel's decision by Judge Calabresi, sanctioned the erroneous decision, misplaced reasoning, and omissions by the lower court judge to keep Plaintiff from his day in court, to rebuff all remedies, and to deny Plaintiff his constitutional rights to a jury.

The Appeals Court panel fundamentally misapprehended the nature of Plaintiff's business and the principal issues in the dispute, and conveniently sanctioned the misplaced reasoning by the lower court judge without a trial, witnesses nor experts, and with relation to issues and events which took place on different continents in America, Europe and Asia, in Chicago, New York, London, Moscow and Siberia in Russia, causing this case from ever reaching a jury, and by mean of sanctioning the omission of the conclusive evidence against Citigroup, and by denying all basic legal and equitable remedies, contradicting all known laws and deciding all factual inferences in this Case to the benefit of the moving party Citigroup in its summary judgment.

The panel has erroneously sanctioned the trial court's granting of summary judgment to defendant, overlooked considerable facts, and missed the disputed genuine issues of material facts. The panel has further sanctioned the district court's approach by deciding factual issues with relation to the dispute, claims, and damages, and has overstepped the proper judicial role, and departed from the legislative intent guaranteed for the protection of all parties in the federal system by the Seventh Amendment to the Constitution. If judges have the discretion to preempt a jury, what is the relevance of the constitutional right to a jury. This Court should order this Case to be constitutionally and properly decided by a jury trial.

A. Factual Background

Petitioner Emile B. Maalouf founded Chicago International Network ("CIN") an Illinois partnership at the beginning of the transformation of the former Soviet Union

from centralized to open market economies in 1992. (opinion and order 09/08/2004 docket U.S.C.A. Appendix-20) Emile B. Maalouf embarked upon extensive travel as of 1992 with his former partner to the former Soviet Union and the various Russian republics, for purpose of business and economic development at the early transformation years. (Decl. Dr. Daniel Maalouf U.S.C.A. Apdx.-58) (E. Maalouf's Passport copies Decl. B. Morag, U.S.C.A. Apdx.-310 to 313). During the course of the perilous Soviet Union transformation, CIN developed significant business relationships and multi-billion dollar opportunities with some of the largest companies in that region, by assisting, advising, and establishing alliances with major Russian business enterprises (Opinion and order U.S.C.A. Apdx. 20) (Decl. Dr. Daniel Maalouf, U.S.C.A. Apdx.-59). As a result of these early investments of time, travel, expense, and efforts, CIN became privy, and uniquely positioned, to direct transactions involving multi billion-dollar in investment capital needed to develop highly profitable projects in the energy and other natural resource sectors in the former Soviet Union. (Fourth Amend. Complaint ("Complt.") p. 2 ¶ 6, Apdx.-115)(Decl. Dr. D. Maalouf , U.S.C.A. Apdx.-59).

During CIN's initial business development years thereafter, CIN entered into formal written agreements and joint venture understandings with major enterprises in the Russian emerging market, and to represent them in their efforts to attract development capital and investments from abroad: Almazy Rossii-Sakha ("Alrosa") the second largest diamond mining company in the world and its financial arm Almazy Yakutii, (Agreements in Complt. Exbt. A, U.S.C.A. Apdx.-128) (Decl. E. Maalouf, Apdx. 109, 181-U.S.C.A. 187 and Apdx. 214, 220) in addition to CIN's planned joint venture with the diamond company in Russia (certain documents Decl. E. Maalouf, U.S.C.A. Apdx.-221-227). The next client to CIN was Oil Corporation Rosneft, a vertically integrated oil company with exploration, extraction, refining and distribution facilities. (See

confidential disclosure to Smith Barney May 10, 1995, Decl. E. Maalc U.S.C.A. Apdx.-70, 72, 74) (Agreements in C lt. Exbt. B, U.S.C.A. Apdx.-131). Through extensive work with Rosneft, CIN developed substantial opportunities with Rosneft's affiliate Gazprom the largest gas company in the world, and engaged Smith Barney to develop those opportunities (Decl. E. Maalouf, U.S.C.A. Apdx. 192) (Complt. Exbt. I, U.S.C.A. Apdx. 143 and 165-168). In addition, CIN developed investment banking business opportunities and acquired a representation mandate for the Department of Business Affairs of the Russian Presidential Administration (Decl. E. Maalouf , U.S.C.A. Apdx.-178-179).

During the initial volatile transformation years of the Former Soviet Union, CIN reinforced its position with its clients by assisting and advising its clients in the various capital development strategies, restructuring and business development plans for their refineries and other projects. (Decl. E. Maalouf, U.S.C.A. Apdx.- 243 to 253) (See samples of CIN's work, included are initial pages of Erelakh Refinery project and the private placement memorandum (Decl. E. Maalouf, U.S.C.A. Apdx. 255-257, 258-270, 272-273)).

CIN's compensation and revenues in the form of cash and equity shares in its client companies and their joint ventures, was to be realized from the capital CIN raises for its clients for their various capital investments projects. (Opinion and Order #88338 docket # 21 p. 2 : 10-14), (Agreements in Complt. Exbt. A, U.S.C.A. Apdx.-128) (Decl. E. Maalouf, U.S.C.A. Apdx. 109, 181-187 and Apdx. 214, 220).

As a result of CIN's multi-billion dollar business opportunities with its clients, CIN favorably evaluated Smith Barney when it was headed by Robert Greenhill, and formally engaged Smith Barney to jointly develop CIN's substantial business with its clients, and signed a restrictive non-disclosure non-circumvention agreement with Smith Barney dated May 10, 1995 (The " May 10, 1995

Agreement")(Complt. Exbt. C, U.S.C.A. Apdx. 132-135) in order to protect CIN's interests while entrusting Smith Barney with CIN's clients, and to guaranty that said opportunities will be developed jointly and successfully with CIN. The restrictive non-circumvention(non-compete) provision held that:

> " You [Smith Barney] agree that neither Smith Barney nor its Representatives will make any separate contact with, deal with, or enter into any transactions with the Listed Parties [CIN's clients] or their affiliates, without CIN's express written permission."

(Complt. p. 3 ¶¶ 7-9, U.S.C.A. Apdx. 116), the May 10, 1995 Agreement (Complt. Exbt. C, U.S.C.A. Apdx. 132-135). CIN's fee structure understanding with Smith Barney was that CIN would be paid on average a one percent (1%) in fees based on capital raised with its clients, while working and developing jointly with Smith Barney, such fee may be negotiated based upon the nature of the transaction, however, as per its May 10, 1995 Agreement, CIN would maintain control over its clients. (Decl. E. Maalouf, U.S.C.A. Apdx. 86-89 and Apdx. 189-190).(Complt. Exbt. D, U.S.C.A. Apdx. 136-138).

Smith Barney in 1995 after its several restructuring delays, was an investment bank that was strategically planning to expand overseas under the professional leadership of Robert Greenhill, until Sanford Weill replaced Mr. Greenhill with James Dimon in January of 1996. (Complt. ¶ 8, U.S.C.A. Apdx.-116)(Decl. E. Maalouf, U.S.C.A. Apdx.-196-199).

In 1995 CIN was working extensively with its overseas clients and Smith Barney to develop the business opportunities, including trips to the U.S. by top executives from its client companies and visits to Chicago, and New York with Smith Barney, included representation by Smith Barney to CIN's clients of long term financing that could

ultimately exceed US $1 billion dollars. (Decl. E. Maalouf, U.S.C.A. Apdx.-84, 85, Apdx.-245).

CIN's recorded out-of-pocket expenditure to develop its overseas business without any payments to its partners for the year 1993, 1994, and 1995 alone was $180,688 (CIN's tax documents Decl. Boaz Morag Exbt.4, CIN 00511- CIN 00520, docket # 51). CIN's investment in the Russia business including five years of work by its partners as of 1992, in addition to overseas extensive travel and expenses equaled to over $900,000. (Responses to Interg. costs and expenses Decl. Boaz Morag Exbt. 9 # 51, U.S.C.A. Apdx. 304). CIN's business and its planned development suffered serious setbacks due to the restructuring, changes and defections of Smith Barney's executives until May 23rd, 1996 when Maalouf traveled to New York to reassess the Smith Barney relationship, there he was assured of Smith Barney's high interest in CIN's clients and that the delays were due to internal restructuring. (Decl. E. Maalouf, U.S.C.A. Apdx. 191). At that trip, Maalouf was introduced by Rick Andlinger the Co-Head of the Energy Group to Kamal Tabet, the Head of Smith Barney Investment Banking in Europe, and Smith Barney exhibited to CIN its further commitment to develop the business opportunities with CIN's clients by signing an additional agreement, consisted of a consulting agreement dated June 24, 1996 (the "June 24, 1996 Agreement"), which contained the same restrictive non-compete provisions as the May 10 Agreement, prohibiting Smith Barney from any circumvention of CIN including any contact or dealings with CIN's clients without CIN's express written permission, and to organize a Smith Barney delegation consisting of Andlinger and Tabet and others to travel to Russia to conclude the transactions with CIN's clients (Decl. E. Maalouf-Agreement Complt. Exbt. C, U.S.C.A. Apdx. 136-138).

The meetings with the Presidential Administration, Almazy Rossii-Sakha (Alrosa), Rosneft Oil Company, Sakhalinmorneftegas and Gazprom, and the multi-billion

dollars of planned transactions are memorialized in Smith Barney's Investment Banking Division's Call Memos. (Decl. Boaz Morag exbt. 1 Complt. Exbt. E, F, G, H, I, U.S.C.A. Apdx.-139, 140, 141, 142, 143). Smith Barney exhibited priority interest in concluding business initially with two of CIN's clients Gazprom and Alrosa following the Russia visit, to the extent that Smith Barney's executive affirmed in the Investment Banking Call Memo that: "with Gazprom, ARS [Alrosa] is probably the highest quality company in Russia and dealing with them would be a real coup for Smith Barney over there." (The penultimate paragraph, Complt. Exbt. F, U.S.C.A. Apdx.-140) and then followed with a letter dated September 20, 1996 faxed to Plaintiff on September 19, 1996 for review, and addressed to Mr. Edward Ivanov, the Director of Department of Securities at Gazprom affirming Smith Barney's intent by stating: " We [Smith Barney] would be delighted to sponsor what I believe could be the world's largest publicly traded oil and gas company in the US markets. I look forward to seeing you again soon." (Decl. E. Maalouf, U.S.C.A. Apdx. 166, 167, 168) (Last paragraph, U.S.C.A. Apdx. 167).

Smith Barney's representations of preparing the proposals for CIN's clients were delayed. (Decl. Boaz Morag Exbt. 2, Maalouf Dept. Tr. 128:23-25, Tr.129:2-25, Tr.130:2-25, Tr.131:2-25, Tr.132:2-6, U.S.C.A. Apdx. 352-354). Plaintiff probed Smith Barney throughout the fourth quarter of 1996 and up to April of 1997 to deliver what was promised to CIN's clients. (Letter dated April 15, 1997 to Smith Barney's CEO James Dimon, Decl. E. Maalouf, U.S.C.A. Apdx. 93-95). Smith Barney initially attributed the delays to internal preparation and the December holidays, as well as certain developments on the Russian market for an anticipated sovereign bond issuances. Then, Smith Barney continued in representing to CIN its serious interest in concluding the business with CIN's clients, however, attributed the further delays to internal restructuring, until plaintiff probed Smith Barney in the

April 15, 1997 letter to James Dimon, in addition to firm communications with Tabet to deliver what was promised to CIN and its clients, and to extend the consulting agreement and conclude the transactions, which lead to discovering the conflicting intentions of Smith Barney. (Letter dated April 30, 1997 to Lewis Glucksman, Smith Barney's Vice Chairman following his telephone exchange with Petitioner, Decl. E. Maalouf, U.S.C.A. Apdx. 96-97). Plaintiff served a formal notice to Smith Barney not to interfere with CIN's clients in the Letter of April 30, 1997 (First page, the last five lines, Glucksman Depst. Exbt. 4, U.S.C.A. Apdx. 149). Smith Barney denied any direct dealings with CIN's clients in a Letter dated May 20, 1997 from Mark Amrhein, Smith Barney's Director and General Counsel (Glucksman's Depst. Exbt. 6, U.S.C.A. Apdx. 151-152), when in fact Smith Barney was circumventing CIN directly with CIN's client Alrosa, and Tabet testified that he dealt directly with Alrosa as of April 23, 1997.(Decl. Morag, Tabet depost. p. 79:1-10, U.S.C.A. Apdx. 407, Tabet's answer in U.S.C.A. Apdx. 148).

CIN became exhausted financially due to the delays and the lack of revenues since engaging with Smith Barney, which crippled its development. Then, CIN began discovering Smith Barney's breaches and betrayal. (Letter dated July 9, 1997 to James Dimon, CEO of Smith Barney following a settlement meeting with Mark Amrhein its General Counsel in New York on June 12, 1997, Decl. E. Maalouf # 47, U.S.C.A. Apdx. 100-102). Following CIN's discovery of Smith Barney's direct circumvention of CIN with Alrosa, and Smith Barney's reneging its prior commitment to resolve the dispute arising out of RAIB's (Russian American Investment Bank) transaction, Smith Barney was actively stalling and stonewalling in its negotiations and settlement with CIN, which lead CIN to realize that regardless of CIN's diligent efforts to mitigate damages, that Smith Barney was not dealing in good faith and the dispute officially began. (Decl. E. Maalouf, U.S.C.A. Apdx. 100-102, 103, 104, 105-107, 108). Smith

Barney was in a dominant financial advantage and elected to test CIN's resolve, and was aware of CIN's financial pressure due to its prior extensive investment and depletion of its resources, due to the lack of revenues from the expected earnings of the opportunities and transactions entrusted to Smith Barney. (Decl. E. Maalouf, U.S.C.A. Apdx. 100-102, 103, 104, 105-107, 108). CIN had varied remedies at the time, however, CIN maintained the high ground and professional image, and refrained from using certain leverage and its high level connections overseas to fight Smith Barney and expose Smith Barney's sinister betrayal of CIN, and instead, Petitioner relied upon the U.S. Justice System for the enforcement of its strict agreements for purpose of CIN's recovery from Smith Barney, (Complt. Claims and Exhibits, U.S.C.A. Apdx. 114-143), CIN proceeded with the legal action despite the additional debilitating financial burdens, health and emotional distress caused by the dispute, and the prosecution of the claims due to Citigroup's substantial resources advantage.

The $500,000,000 transaction already structured for Alrosa was busted and ruined by Smith Barney due to its relationship problems with Alrosa while it was circumventing CIN, and due to its lack of understanding and experience in the business culture in that part of the world, resulting in Smith Barney's breaches and alienation and Circumvention of CIN. (Decl. B. Morag, U.S.C.A. Apdx. 293)(Decl. E. Maalouf, U.S.C.A. Apdx. 53). The Gazprom transaction was delayed as a result of the Russian Ruble's collapse in 1998, which caused all investment banking issues in Russia to be frozen until the regain of investors' confidence in early 2002, then defendant consummated the $1,200,000,000 Gazprom Eurobond transactions. (Decl. E. Maalouf , U.S.C.A. Apdx. 154-158 and U.S.C.A. Apdx. 236-239).

CIN engaged certain law firms and received extremely encouraging advice by others, and was forced to prosecute the claims unrepresented at times due to its depleted resources and its exhausted borrowing, and the lawsuit

against defendant was filed on June 20, 2002 following the demand letter package to Sanford Weill dated April 9, 2002.(Decl. E. Maalouf, U.S.C.A. Apdx. 61 to 113) (U.S.C.A. Apdx.2).

Defendant held on to the entire revenues from CIN's clients, and causing Petitioner health and financial harm, in addition to Smith Barney's ruin of CIN's business and development. (U.S.C.A. Apdx. 466-469)(Decl. E. Maalouf, U.S.C.A. Apdx. 60, 172, 173).

REASONS FOR GRANTING THE PETITION

This Court is the ultimate guarantor of the law of the land and the principles upon which the Nation was found. The U.S. Constitution intended to protect and provide liberty and justice for all. When an injured party endures an unbalanced litigation process in seek of justice, and the court places blocking obstacles for the injured to have his day in court, the court in this case, takes the role as if indirectly penalizing the injured party for seeking justice, and in turn rewarding the violator and encouraging its repeat of the breach and offenses to other. As a consequence, the level of confidence in a just resolution by the court system can be eroded, especially when the opponent is influential and dominant, and the injured would be forced to alternative means to achieve justice.

I. CONSTITUTIONAL RIGHT TO A TRIAL BY JURY

Whether the decision by the lower court judges to preclude a trial by jury in the presence of a factual and substantial dispute, constituted an abuse of discretion and rendered the Seventh Amendment's Constitutional right to a jury irrelevant.

Without a waiver of the right of trial by jury, or by stipulation or consent by the parties, the court errs if it substitutes itself for the jury. There is no such stipulation in this case, and there is nothing in the record from which

such a stipulation or waiver may be inferred. Petitioner's Constitutional rights to a jury have been improperly pre-empted by the lower court, matters of facts are for a jury to decide. The right of trial by jury in the courts of the United States is expressly secured by the U.S. Constitution's, VII Amendment. Plaintiff has invested several years in the dispute and the ensuing litigation with Citigroup, and has sustained detrimental damage to his business, finances, health and well-being in prosecuting the claims, and for purpose of having his day in court in the presence of a reasonable jury. Petitioner has been deprived of this right by the act of the lower court. "It has been often said by the U.S. Supreme Court that the trial by jury is a fundamental guaranty of the rights and liberties of the people. This constitutional right the U.S. Supreme Court has always guarded with jealousy." *Doe v. Grymes,* 1 Pet. 469; *D'Wolf v. Rabaud,* Id. 476; *Castle v. Bullard,* 23 How. 172; *Hodges v. Easton,* 106 U.S. 408; S. C.1 SUP. CT. REP. 307.

A. <u>ALROSA</u>:

ALROSA'S PRINCIPAL ISSUE WAS NOT ONLY ABOUT FEE IN THE CONTRACT. DAMAGES CAUSED BY THE PREVAILING BREACH OF CONTRACT ARISING OUT OF THE $500 MILLION ALROSA EUROBOND TRANSACTION AND OTHER DAMAGES WERE INCORRECTLY CONCLUDED BY THE PANEL AS NOMINAL.

The essence of the U.S.C.A.'s Panel's decision was that despite the breaches and violations committed by Defendant against Plaintiff, Defendant should be exonerated despite the ruin of Plaintiff's business because Defendant could not steal the loot with regards to Alrosa. The Panel misapprehended the nature of Plaintiff's business and the dispute by assuming that the dispute was only about the fee stated in the contract. Further, the Panel overlooked the overwhelming evidence in the Brief and Appendix, which confirmed Plaintiff's Power of Attorney

and substantial Joint Agreements with Alrosa, as well as Petitioner's standing with the senior Alrosa executives and the long relationship with Alrosa since 1992, as provided in(Factual Background). In addition, the testimonies at trial would further cement Petitioner's position that the Alrosa Eurobond transaction would have been prevented from being ruined as a result of Respondent's relationship problems with Alrosa following its circumvention of Petitioner, and due to Respondent's systematic breaches of the Agreements and its concealment and cover-up of the breaches until Defendant was caught. The fact that Petitioner was denied from presenting the facts to the fact finder, the jury, is at the heart of the issues in this Case.

Petitioner's principal provisions in the May 10, 1995 contract and the June 24, 1996 Contracts with Respondent are the restrictive provisions which guaranteed non-compete safeguards by Respondent to offset Smith Barney's dominant resources advantage, and to insure that the projects are worked jointly with CIN, in order to protect the transactions from being ruined as the one with Alrosa, and to insure that CIN would realize its joint agreements benefits with its clients, and to be part of the market growth, which were entirely destroyed by Respondent's violations. The Panel, erroneously, further assumed the role of the jury and decided that Alrosa's ruined $500 million Eurobond transaction was not the fault of Respondent despite Respondent's breach and its relationship problems with Alrosa, and decided again without a jury and without a trial nor witnesses or experts, that Petitioner would not have been able to save the Eurobond transaction had Petitioner not been circumvented, despite the overwhelming evidence in the Brief and Appendix of Petitioner's strong and close relationship with Alrosa, of Petitioner's Power of Attorneys from Alrosa, of the duration of Petitioner's relationship with Alrosa which started three years prior to Defendant, of the facts that Plaintiff painstakingly developed the Alrosa relationship and business by extensive travel to Alrosa's base of

operations and headquarters in Mirny, Yakutia in Eastern Siberia, six hours time zone difference from Moscow, and its top executives on more than one occasion were Plaintiff's guests in Chicago. On the other hand, Defendant's former vice Chairman Lewis Glucksman the main driver behind the breaches and violations, and Defendant's front person in Russia at that time, testified that he had never set foot in Siberia nor Alrosa's main headquarters while he circumvented Plaintiff in attempting to steal the $500 million Eurobond transaction, before he had it entirely ruined. Lewis Glucksman at that time did not have any understanding of the Russian business culture nor had the necessary relationships nor trust established to get anything done, he was blindly motivated by envy and greed. The essence of the Panel's decision, was that Defendant should be completely exonerated despite the breaches and harm caused to Plaintiff, and for the sole reason that defendant could not getaway with the loot from Alrosa, therefore no harm was done. The Panel also erroneously denied the specific fee loss from the contract and entirely overlooked all other remedies in law and equity Petitioner is entitled to as a result of Respondent's violations. The Panel cited as a reason for denying Plaintiff any remedy, the cases of *Freund v. Washington Square Press, Inc.* 314 N.E. 2d 419, 422 (N.Y. 1974) and *Adams Apple Distrib. Co. v. Papeleras Reunidas, S. A.*, 773 F.2d 925, 930 (7th Cir. 1985) which instead, further reinforced Petitioner's Case. Freund first was afforded a trial to present his case and evidence, and his case was not erroneously decided behind the bench. Noting, Freund's case was a local case and fairly simple, it did not require the same vigilant fact finding required in this International multi-faceted Case. Freund was paid a relative advanced payment for his manuscript, and the manuscript was returned to Freund were he later published and benefited. In this Case, neither portion of the fees, nor anything was returned to Plaintiff, because either the transaction was ruined by Defendant, or Defendant pocketed the entire

revenues illegally through a set of excuses. Furthermore, Freund was academically promoted and did not suffer any noticeable damages to his business, unlike Plaintiff in this Case. CIN's entire business was destroyed, with it over $100 million dollars in value of equity and revenues based on today's proven market, which were entirely ruined as a result of Respondent's violations. Further, in Freund, damages were nominal because they were based on the consequences of the breach to plaintiff Freund, however, in CIN's Case, the consequences of the breach are over $100 million, although CIN estimated the damages at over $30 million in compensatory damages in the Complaint in order not to be labeled as excessive. When applying the case citations in Freund's case about the damages remedies, as well as the contract laws in the published opinion of *Freund v. Washington Square Press, Inc.* 314 N.E. 2d 419, 422 (N.Y. 1974) they serve in further exposing the discrepancies in the denied rights to Petitioner in this Case. Plaintiff in CIN's Case, is clearly entitled to the remedies of restitution, reliance and expectation which were entirely denied. Unlike in CIN's Case, Freund did not claim reliance losses: "At, the trial on issue of damages, plaintiff [Freund] alleged no reliance losses suffered in performing the contract or making necessary preparations to perform. Had such losses, if foreseeable and ascertainable, been incurred, plaintiff would have been entitled to compensation for them. (Cf. *Bernstein v. Meech*, 130 N. Y. 354, 359.)

The damages as provided in Plaintiff-Petitioner's Complaint can only be decided at trial, and by a reasonable jury.

B. <u>GAZPROM</u>:

GAZPROM 'S PRINCIPAL ISSUE WAS NOT ABOUT THE BROKERING FEE. DAMAGES CAUSED BY THE PREVAILING BREACH OF CONTRACT ARISING OUT OF THE $1.2 BILLION GAZPROM EUROBOND TRANSACTION AND OTHER

DAMAGES WERE INCORRECTLY CONCLUDED BY THE PANEL AS NOMINAL.

In the Gazprom breach issues, the Panel's sole reasoning for denying Plaintiff any recovery, compensatory or equitable, was the contradictory request of Maalouf having to prove that the $1.2 billion Eurobond transaction was completed ""solely by reason" of illicit contacts between Smith Barney and Gazprom", when again Maalouf could not further participate in developing the transaction, and was illegally circumvented after initiating the relationship and the transactions between Defendant and Gazprom. This issue is portrayed here as if Respondent was working jointly and in good faith on the transaction with Gazprom, and Plaintiff somehow didn't perform: Maalouf here is being illogically penalized for Defendant's violations. Further, since the real estate transaction comparison was used by Judge Calabresi during oral argument, if breaches of agreements was freely allowed as in our Case, it does not take a genius to circumvent a real estate broker, and to further negotiate and conclude a real estate transaction between a buyer and a seller, and without any additional input from the broker whom initially introduced the parties and elements of the transaction. Conveniently, as in this Case, the breaching party would keep the entire broker's fees. If this is the new law and rationale, it would certainly create a public policy disaster, the justice system would have to build many additional courts to accommodate the resulting disputes and aggrieved parties. Therefore, the question is how is it possible to further develop, control and expedite a transaction when you are sinisterly and illegally cut out of the transaction? Again, the Panel additionally misapprehended the nature of Petitioner's business and the dispute as in the case of Alrosa, by assuming that the dispute was only about the fee stated in the contract. The Panel overlooked the fact that the transaction with Gazprom was: 1) delayed beyond the initial terms of the Agreements because Plaintiff was circumvented and was not able to participate to expedite it, and due to the

conclusive fact that the delay was caused by the collapse of the Ruble until investors' confidence was regained and the transaction was first to be offered, as proven in the Brief and U.S.C.A. Appendix. 2) In addition to the above, there is also the question of why would supplemental substantial courtesies be extended to Citigroup by assuming that its obligations to Plaintiff, terminates at the exact date stated in the Agreement, when the evidence prove that the Agreement was materially breached, and that Citigroup without compensating Petitioner concluded the same transaction with the same CIN client Gazprom? When an agreement is materially breached, the breaching party must not enjoy the benefit by concluding stolen business after the agreement's initial term. The obligations under a materially breached agreement must extend until the injured party is compensated when it comes to the same client and transaction, and not be limited to the date as if the agreement had been fully performed to the detriment of the injured non-breaching party. Even without a transaction, in this Case Plaintiff must additionally recover because the Agreement objective was for non-compete restrictions and it was entirely breached, Plaintiff's business suffered tremendous damages, and should recover from the remedies in law and equity if justice is the objective. Plaintiffs are also entitled to Defendants' profits under the erroneously overlooked theory of unjust enrichment.

Plaintiff's principal provisions in the May 10, 1995 contract and the June 24, 1996 Contracts with Defendant were the restrictive provisions which guaranteed non-compete safeguards pledged and committed to by Respondent to offset Respondent's dominant resources advantage, and to insure that the projects were worked jointly with CIN, in order to protect the transactions from being ruined as the one with Alrosa, and to insure that the transactions would close during the term of the Agreement if outside of a breach, and to further insure that CIN would realize its joint agreements with Gazprom's affiliate

Rosneft Oil Corporation, and for CIN to be part of the market growth, which were entirely ruined by Respondent's violations. Additionally, the Panel based its sole decision in denying Petitioner any remedy by contradicting the basic logic in this Case: The November 28, 2005 Summary Order, stating that: in the case of Gazprom "Maalouf offers no evidence to support his conclusory statements that the offerings occurred "[a]s a results, and solely by reason" of illicit contacts between Smith Barney and Gazprom while the Agreements were still in force. Accordingly, here too, Maalouf's recovery is limited to nominal damages." However, the Panel did not explain the impossible task bestowed upon Maalouf, about how Maalouf was to offer evidence at present beyond what was offered already: that Smith Barney materially breached the Agreement during its initial active terms, that the Respondent breached the Agreement willfully, that the Respondent concealed its breach until it was caught, and that the Respondent was first introduced to the Gazprom's most senior executives by Maalouf, and that the Respondent exhibited its high interest and commitment in writing to Maalouf and Gazprom as a result of Maalouf's effort: " With Gazprom, ARS [Alrosa] is probably the highest quality company in Russia and dealing with them would be a real coup for Smith Barney over there." (The penultimate paragraph, Complt. Exbt. F, U.S.C.A. Apdx.-140), and a letter dated September 20, 1996 faxed to Petitioner on September 19, 1996 for review, and addressed to Mr. Edward Ivanov, the Director of Department of Securities at Gazprom affirming Smith Barney's intent by stating: "We [Smith Barney] would be delighted to sponsor what I believe could be the world's largest publicly traded oil and gas company in the US markets. I look forward to seeing you again soon." (Decl. E. Maalouf , U.S.C.A. Apdx. 166, 167, 168) (Last paragraph, U.S.C.A. Apdx. 167). Again, Petitioner suffered irreparable harm by the fact that Respondent breached the non-compete pledges that Petitioner relied upon to its detriment. It would take

CIN much longer time, and millions of dollars to be able to do business and reestablish itself and regain its previous position with its large prime clients such as Alrosa, Rosneft and Gazprom. Petitioner's actual and consequential damages can only be determined by a jury.

II. TORT CLAIMS:

If a claimant provides evidence of premeditated concealment and systematic cover-up of a contract breach by Respondent's multiple high level conspirators, whether such cover-up is considered a standard breach of contract, or it constitutes a tort claim of fraud or at minimal bad faith and unfair dealing.

BREACH OF COVENENT OF GOOD FAITH AND FAIR DEALING CLAIM MUST NOT BE DENIED, DUE TO COMPELLING EVIDENCE OF PREMEDITATED FRAUD. THE INTERFERENCE WITH BUSINESS RELATIONSHIP CLAIMS MUST NOT BE DENIED WITHOUT A TRIAL.

The Panel entirely overlooked the claim of the Breach of the Covenant of Good Faith an Fair Dealing, noting this claim was independent from the other claims, and the evidence presented are overwhelming and demonstrate that Respondent dealt unfairly and in bad faith with Plaintiff, prior and throughout this dispute, and committed undeniable fraud by concealing its violations from Plaintiff and officially lying about its breaches while trying to buy Petitioner's rights and interest cheaply during the settlement negotiation in 1997. Such claims are tried independently in the courts, Petitioner has presented the related conclusive evidence of bad faith, unfair dealing and the premeditated fraud committed, and with a corroborated timeline as shown in the U.S.C.A. Brief and Appendix. Petitioner challenges any assumption otherwise. How could such a solid claim be denied and decided without the presence of the fact finder the jury? Refer to the April 30, 1997 letter marked (Glucksman Depst. Exbt. 4, U.S.C.A.

Apdx.-149 bottom of page), said letter was a formal notice to Smith Barney: " to_cease all contacts with our clients [CIN's] whether directly or indirectly, by Smith Barney or through its affiliates, in conformation with our Agreement of May 10, 1995. We also reiterate the request for a detailed explanation of the nature of activities and interference by Smith Barney's affiliate (the Russian-American Investment Bank) in dealing directly with our client (Almazy Rossii Sakha) [Alrosa])." Smith Barney fraudulently concealed and denied dealings with any of CIN's clients at that time in a letter reply dated May 20, 1997 marked (Glucksman Depst. Exbt. 6, U.S.C.A. Apdx. 151-152), and continued it's denial and stonewalling until it got caught. Petitioner's concern overseas was mainly about the risk that the economic system could be turned back and the industries renationalized by a possible new communist government, our main risk wasn't about executives of a large U.S. company stealing our revenues and business in the presence of our firm Agreements. However, Sanford Weill, Lewis Glucksman, and James Dimon knew exactly what they were doing, and they always had the options: one to conclude the business jointly as planned, second to compensate Petitioner and negotiate an exit, another to wait until the Agreements expire, but they have done neither, and arrogantly decided to break the law. One must imagine the reaction of law scholars and students, if Judge Calabresi using this Case as an example after providing its specific facts, stated that the above breaches and fraudulent concealments were not bad faith and unfair dealings, and that they were perfectly normal business practice.

Additionally, in the presence of the substantial Agreements between CIN and its clients Alrosa and Rosneft oil Corporation and the breaches committed by Defendant with relation to CIN's clients, the claims of Interference with Contractual and Prospective Business Advantage were misapprehended by the Panel, and it is impossible to envision how such claims in the presence of the aforementioned contracts and breaches, could be

decided without a trial and testimonies of witnesses from the overseas client companies and other witnesses and experts in the presence of a reasonable jury at trial? The damages are beyond what one can imagine, Petitioner's agreements were with the largest companies in that part of the world, the transformation and wealth generated thereafter is of historic proportion. There are currently more billionaires in Moscow than any other city in the world, and they are most around 40 years of age. Ask any business expert, in business, timing is almost everything, and Defendant completely destroyed this timing for us. This is not about Freund's book that if it weren't published today it will simply be published tomorrow. To give an understandable analogy, although analogies are never perfect, and we are certainly not trying to compare ourselves to anyone here, since everyone is unique in their own rights, however, this would give an example about the importance of timing: If for instance IBM in the early years breached and violated its agreements with Bill Gates and Microsoft, and Bill Gates was subjected to the same justice as Petitioner was subjected to in this Case, he wouldn't have been able to survive in business after loosing the timing, his capital, and many years in litigation, and Bill Gates would have been more likely now playing video games at his parents garage.

III. JAMES DIMON'S DEPOSITION:

Whether indirect prior warnings by the trial judge of a looming deposition if the witness answered: yes. would influence the witness' answers, and would prejudice the claimant and diminish the value of discovery.

THE PANEL MUST NOT PUT THE CART BEFORE THE HORSE IN THE CASE OF RAIB AND CITE RAIB AS A REASON FOR EXONERATING JAMES DIMON.

The Appeals Court panel erred in placing the cart before the horse with regard to Dimon's deposition. How could Petitioner discuss effectively matters with regard to RAIB

with any reasonable certainty without the deposition of Dimon? Further, RAIB was not the only issue in the requested two hours deposition of Dimon, even the lower courts's two questions to Dimon one was about RAIB, but the other one was about CIN and Glucksman. The two questions drafted by the trial judge as dictated in open court on May 10, 2004 (U.S.C.A. Apdx.-488). Despite James Dimon's direct knowledge of the subjects in the Interrogatories (See Decl. B. Morag Exbt. 3, Tabet dept. Tr. 52:6-20)(Decl. E. Maalouf, U.S.C.A. Apdx. 104), James Dimon's answers contradicted the foregoing facts and other evidence in this Case. (U.S.C.A. Apdx. 490-493, Apdx, 494-495). Furthermore, what would happen if Dimon's deposition shed more lights which may seriously affect any of the claims, or confirm additional fraud or violations? What if it became highly crucial based on Dimon's testimony to depose Sanford Weill? Of course with the approval of the court. Does the Panel in its summary order deny Petitioner its due rights to an equal and balanced discovery, just because it was impossible and unconstructive for Petitioner to put the cart before the horse in the case of RAIB? The witness James Dimon, must properly testify due to the evidence presented and before this Case is submitted for a jury trial.

IV. EQUAL JUSTICE:

NONE OF THE PRECEDING ISSUES SHOULD BE RUSHED AND DECIDED WITHOUT A PROPER JURY TRIAL, AND WITHOUT WITNESSES AND EXPERTS.

"All that is necessary for the triumph of evil is that good men do nothing" by Edmund Burk. In this Case, was there other delaying and inhibiting factor for this action to be properly and constitutionally tried by a jury? Why does it have to take the Supreme Court or other remedies abroad to get justice?

The tremendous efforts to place an iron wall between Petitioner and a reasonable jury is testament to the strength

of the Case. Such a jury would deal a hammer of justice, when presented with the entire evidence of Respondent's ill gotten gain, and their systematic brazen violations and fraudulent maneuvers against Petitioner.

Unless the Respondent and those like them be held accountable, signing restrictive non-compete agreements and prosecuting their breach in the U.S. Federal Courts would simply mean nothing.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: Washington, DC
January 17, 2007

Respectfully submitted,

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APPENDIX-A

(Transcribed From Original Format)(SEAL U.S.C.A. Second Circuit) (FILED NOV 28, 2005 CLERK)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 28th day of November, two thousand and five.

PRESENT:

HON. GUIDO CALABRESI,
HON. BARRINGTON D. PARKER,
HON. RICHARD C. WESLEY,
Circuit Judges.

EMILE B. MAALOUF, doing business as Chicago International Network,
Plaintiff-Appellant,

v. No. 05-0292-cv

CITIGROUP GLOBAL MARKETS, INC., formerly known as Salomon Smith Barney, Inc.,
Defendant-Appellee

For Plaintiff-Appellant: EMILE B. MAALOUF, *pro se*, New York, N.Y.

For Defendant-Appellee: BOAZ S. MORAG (Sanjay S. Mody, *of counsel*), Cleary Gottlieb Steen &Hamilton LLP, New York, N.Y.

On appeal from the United States District Court for the Southern District of New York (Scheindlin, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED.**

Plaintiff-Appellant Emile B. Maalouf ("Maalouf") brought a diversity action against Defendant-Appellee Citigroup Global Markets, formerly known as Salomon Smith Barney ("Smith Barney"), for breach of contract, breach of fiduciary duty, breach of the covenant of good faith and fair dealing, tortious interference with prospective business relations, tortuous interference with contract, and unjust enrichment. The claims arise out of two agreements signed in 1995 and 1996 by Maalouf, doing business as Chicago International Network ("CIN"), and Smith Barney ("1995 Agreement" and "1996 Agreement"), wherein Smith Barney committed, among other things, to refrain from contact or transactions with a list of Russian companies, except as mediated by CINor with CIN's permission.

Maalouf alleges that Smith Barney violated the 1995 and 1996 Agreements by working with Almazy Rossii-Sakha Joint Stock Company ("Alrosa") in 1997 on a never-consummated Eurobond offering, and by underwriting Gazprom's successful Eurobond offerings in 2002. On

Smith Barney's motion for summary judgment, the district court dismissed all claims except the two breach of contract claims. On these latter claims, it assumed breaches, but limited Maalouf's recovery to nominal damages. *Maalouf v. Salomon Smith Barney, Inc.*, No. 02 Civ. 4770 (SAS), 2004 U.S. Dist. LEXIS 17873 (S.D.N.Y. Sept. 8, 2004). Maalouf appeals.

We assume the parties' familiarity with the facts, the procedural history, and the specification of issues on appeal.

We affirm for substantially the reasons given by the district court. As to Alrosa, even if Smith Barney did breach the 1995 Agreement by working on a Eurobond transaction for Alrosa, the only damages Maalouf could claim would derive from compensation that Smith Barney received but failed to share with Maalouf. The offering fell through, however, and it is undisputed that Smith Barney received no compensation. Hence, Maalouf was owed nothing. The result is similar with respect to Gazprom. The Gazprom offerings took place in 2002, years after the 1995 and 1996 Agreements had expired, and Maalouf offers no evidence to support his conclusory statements that the offerings occurred "[a]s a result, and solely by reason" of illicit contacts between Smith Barney and Gazprom while the Agreements were still in force. Accordingly, here too, Maalouf's recovery is limited to nominal damages. *See, e.g., Freund v. Washington Square Press, Inc.*, 314 N.E.2d 419, 422 (N.Y. 1974) (recognizing that when actual damages cannot be proved with the required certainty nominal damages alone are recoverable); *Adams Apple Distrib. Co. v. Papeleras Reunidas, S.A.*, 773 F.2d 925, 930

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1 The 1995 Agreement contains an Illinois choice of law clause, and the 1996 Agreement contains a New York choice of law clause. With respect to Maalouf's claims, the result is the same under the law of either state.

(7th Cir. 1985) (noting that a plaintiff who fails to establish a proper basis for calculating damages may be awarded only nominal damages) (citing *Schoeneweis v. Herrin*, 443 N.E.2d 36, 42 (Ill. App. Ct. 1982)).

Maalouf also challenges the district court's denial of his request to depose the former president of Smith Barney concerning Smith Barney's involvement in a transaction with the Russian-American Investment Bank ("RAIB"). But because Maalouf has abandoned his claims relating to RAIB, we need not consider whether the district court acted within its discretion in denying this request. Maalouf's tortious interference claims fail as a matter of both New York and Illinois law for the reasons explained by the district court.

We have considered all of Maalouf's other contentions, and we find each of them to be without merit. Accordingly, we AFFIRM the judgment of the district court.

For the Court,

ROSEANN B. MACKECHNIE,
Clerk of Court

by: "s/Oliva M. George"
Oliva M. George, Deputy Clerk

UNITED STATTES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Court House, 40 Foley Square
New York 10007

Roseann B. MacKechnie, CLERK

Filed AUG 14, 2006 Seal of
Date: United States Court of Appeals Second Circuit
Docket Number: 05-0292-cv
Short Title: Maalouf v. Salomon Smith Barney
DC Docket Number: 02-cv-4770
DC: SDNY (NEW YORK CITY)
DC Judge: Honorable Shira Scheindlin

At a stated term of the United States Court of appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in te City of New York, on the 09th day of August two thousand six. -

Emile B. Maalouf, doing business as Chicago International Network,

Plaintiff-Appellant,

v.

Citigroup Global Markets, Inc., formerly known as Salomon Smith Barney, Inc.

Defendant-Appellee

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Emile B. Maalouf. Upon consideration by the panel that decided the appeal, it is ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court, Roseann B. MacKechnie, Clerk
By: "s/J. W. Young" Motion Staff Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EMILE B. MAALOUF, individually d/b/a CHICAGO INTERNATIONAL NETWORK, Plaintiff,	:	OPINION AND ORDER
- against -	:	02 Civ. 4770 (SAS)
SALOMON SMITH BARNEY, INC., Defendant.	:	

SHIRA A. SCHEINDLIN, U.S.D.J.:

I. INTRODUCTION

Emile Maalouf, doing business as Chicago International Network ("CIN") and appearing pro se, is suing Salomon Smith Barney, Inc., ("Smith Barney") for breach of contract, breach of fiduciary duty, breach of the covenant of good faith and fair dealing, tortuous interference with prospective business relations, tortious interference with contract, and unjust enrichment. Jurisdiction is based on diversity of citizenship, pursuant to 28 U.S.C. § 1332. Smith Barney is moving for summary judgment dismissing all of Maalouf's claims, or, in the alternative, limiting his recovery to nominal damages. For the following reasons, Smith Barney's motion for summary judgment is granted, dismissing all claims other than breach of contract, and limiting recovery for the contract claim to nominal damages.

II. BACKGROUND

The following facts are taken from the Fourth Amended Complaint, the parties' Rule 56.1 statements, and relevant

affidavits and declarations. Unless otherwise indicated, the facts are undisputed.

A. Introduction

Maalouf, a Virginia resident, formed CIN, an Illinois partnership, in1992. CIN was formed to develop business opportunities in the emerging markets of the former Soviet Union, "by assisting, advising and establishing alliances with major Russian business enterprises."[1] Maalouf travelled to Russia for the first time in 1992.[2] In the following years, CIN entered into agreements with at least two Russian enterprises to act as their "exclusive representative" for "financing and advisory services."[3] Maalouf approached Smith Barney in 1995 for the"purpose of underwriting capital markets transactions by major Russian companies in the United States."[4] CIN was to act as an intermediary between Smith Barney and the Russian companies with which Maalouf had developed contacts, introducing Smith Barney to these companies and receiving fees in return once a deal was consummated. Maalouf approached Smith Barney because Smith Barney had no presence in Russia at that time.[5] The rights and obligations of the parties were memorialized in the following two agreements.

B. The Agreements

On May 10, 1995, CIN and Smith Barney entered

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1 Plaintiff's Statement of Material Facts Pursuant to Local Rule 56.1 ("Pl. 56.1") ¶ 3.

2 *See id.* ¶ 5.

3 November 23, 1994 Agreement between Almazy Yakutii Co. and CIN ("Nov. 23 Agreement"), Ex. B to Fourth Amended Complaint ("Compl."). Almazy Yakutii is the financial arm of Alrosa. *See also* June 28, 1995 Agreement between Oil Corporation Rosneft ("Rosneft") and CIN, Ex. C to Compl.; Compl. ¶

4 Pl. 56.1 ¶ 6.

5 *See id.* ¶ 7.

into a Non-Disclosure and Non-Circumvention Agreement (the "May 1995 Agreement") whereby CIN was to act as representative for three Russian companies, referred to as "Listed Parties" in the Addendum attached to the May 1995 Agreement.[6] The three companies were Rosneft, Almazy Yakutii, and Almazy Rossii-Sakha Joint Stock Company ("Alrosa").[7] The May 1995 Agreement describes these Listed Parties as "seeking advice and assistance with regard to the potential sale of their securities in the United States and elsewhere."[8]

Pursuant to the May 1995 Agreement, CIN agreed to provide Smith Barney with certain "Confidential Information" relating to the Listed Parties. Smith Barney in turn agreed to maintain the confidentiality of that information.[9] More importantly, Smith Barney agreed that "neither Smith Barney nor its Representatives will make any separate contact [sic] with, deal with, or enter into any transactions with the Listed Parties or their affiliates, without CIN's express written permission."[10] It is this provision that Maalouf alleges Smith Barney breached. The May 1995 Agreement did not include any provisions relating to CIN's compensation.

The agreement further provided that it would "terminate three years from the date hereof, unless otherwise extended by mutual agreement of the parties."[11] Because no such mutual agreement took place, the contract expired by its terms on May 10, 1998.[12]

On June 24, 1996, the parties entered into a supplemental

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6 *See* May 1995 Agreement, Compl. Ex. D.
7 *See id.*, Addendum.
8 *Id.* at 1.
9 *See id.*
10 *Id.* at 2.
11 *Id.* at 3.
12 *See* Pl. 56.1 ¶ 10.

agreement (the "June 1996 Agreement").[13] Smith Barney characterizes this agreement as intended to "advance CIN costs for organizing a trip to Moscow and to set up a short window of three months to see whether any of Maalouf's contacts would bear fruit."[14] Maalouf's view is that the agreement was "made to share in cost [sic] and to demonstrate to CIN that Smith Barney was serious and able to close business after failing CIN for over a year with its clients."[15] Despite this dispute as to its purpose, the provisions of the June 1996 Agreement are clear.

The June 1996 Agreement sets forth specific terms and conditions governing CIN's arrangement with Smith Barney. The June 1996 Agreement describes the scope of services to be provided by CIN to Smith Barney as follows:

> The Company [CIN] agrees to provide consulting services to Smith Barney on an exclusive basis with regard to business opportunities, including the potential offering of securities in the United States ("collectively, "Business Opportunities") for the Russian companies identified as "Listed Parties" in a letter agreement between the Company and Smith Barney, dated May 10, 1995.[16]

The June 1996 Agreement was to expire "upon the earlier to occur of the date upon which Smith Barney reaches a definitive conclusion as to whether to pursue a Business Opportunity and communicates such conclusion to the Company or September 30, 1996, unless extended by mutual written consent."[17] The parties agree that the agreement was never extended.[18]

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13 *See* June 1996 Agreement, Ex. E. to Compl.

14 Defendant's Statement of Material Facts Pursuant to Local Rule 56.1 ("Def. 56.1") ¶ 11.

15 Pl. 56.1 ¶ 11.

16 June 1996 Agreement at 1.

17 *Id.* at 2.

18 *See* Pl. 56.1 ¶ 12; Def. 56.1 ¶ 12.

With regard to compensation, the June 1996 Agreement provides for the payment of a $25,000 consulting fee, payable in two installments of $12,500. The first installment was payable upon execution of the June 1996 Agreement and the second upon its expiration.[19] Maalouf received this payment.[20] This was not intended to be Maalouf's only compensation:

> The parties acknowledge that the compensation described in the preceding paragraph shall not constitute compensation for closing any transaction with one or more Listed Parties, and the parties agree to negotiate a reasonable compensation to be paid by Smith Barney to [CIN] in the event such a transaction is completed on terms customary for Smith Barney for similar services (unless otherwise agreed to in writing by both parties).[21]

The June 1996 Agreement provides that CIN is to function as an independent contractor with regard to the above services, not as an employee or agent of Smith Barney. The agreement "does not create a partnership or joint venture between [CIN] and Smith Barney."[22] Nor does it constitute CIN's "'express written permission'. . . to make a separate contact [sic] with or enter into a transaction with any of the Listed Parties."[23]

Both the May 1995 Agreement and the June 1996 Agreement contain provisions to the effect that they "may not be amended or modified other than by a written agreement executed by each of the parties."[24] The June 1996 Agreement states that it "supersedes all prior

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19 *See* June 1996 Agreement at 1.
20 *See* Pl. 56.1 ¶ 13.
21 June 1996 Agreement at 2.
22 *Id.* at 2.
23 *Id.*
24 *Id.* at 3.

agreements (except for the [May 1995 Agreement]) whether oral or written."[25]

The two contracts contain different choice of law clauses. The May 1995 Agreement provides that "[t]he laws of the State of Illinois shall govern all aspects of this letter agreement."[26] The June 1996 Agreement provides that "[t]his agreement shall be governed by and construed in accordance with the laws of the State of New York."[27]

C. The August 1996 Meetings in Moscow

In August 1996, Kamal Tabet, a Managing Director at Smith Barney, accompanied Maalouf on a visit to Moscow.[28] Maalouf and Tabet met with representatives of various Russian business and government entities, including, among others, the Listed Parties Alrosa and Rosneft, and the gas company Gazprom.[29] Smith Barney claims that, "[f]ollowing these meetings, Smith Barney was disappointed because it did not think it had been exposed to decision-makers."[30] Maalouf contends that "Smith Barney was very impressed with the level of contact."[31] In any case, Smith Barney did not extend the June 1996 Agreement.[32] Maalouf made no further trips to Russia, and has had no contact with the Listed Parties or Gazprom since "about the end of 1996 early 1997."[33]

D. The Alleged Breaches

Maalouf alleges breaches of the May 1995 and June 1996 Agreements by Smith Barney with respect to three transactions.

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25 *Id.*
26 May 1995 Agreement at 3.
27 June 1996 Agreement at 3.
28 *See* Pl. 56.1 ¶ 14.
29 *See id.* ¶ 15.
30 Def. 56.1 ¶ 16.
31 Pl. 56.1 ¶ 17.
32 *See id.*

1. The "Alrosa Busted Transaction"

In 1997, Alrosa retained Smith Barney to work on a planned Eurobond Offering.[34] The offering was never consummated.[35] Smith Barney invoiced Alrosa for a "busted deal fee" of $75,000 and for expenses of $197,880, but Alrosa paid neither.[36] Maalouf alleges that Smith Barney's 1997 dealings with Alrosa breached the agreements between the parties.[37]

2. The "Gazprom Transaction"

Maalouf arranged a meeting between Gazprom and Smith Barney on August 15, 1996.[38] This was the only meeting Maalouf arranged between the two entities.[39] Maalouf offers a draft term sheet of a transaction between Smith Barney and Gazprom from 1997 as evidence of direct dealings between Smith Barney and Gazprom.[40] However, no deal between Gazprom and Smith Barney was consummated until April and October 2002, when Smith Barney served as one of the lead underwriters of $1.2 billion in Eurobond offerings for Gazprom.[41] Smith Barney earned $5,386,087 from this offering.[42] Based on this conduct, Maalouf alleges that Smith Barney "breached its contractual obligations to CIN by dealing directly with Gazprom without CIN's express permission both during the

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33 *Id.* ¶¶ 18, 19.
34 *See id.* ¶ 27.
35 *See id.* ¶ 28.
36 *Id.* ¶ 29.
37 *See* Compl. ¶ 22.
38 *See* Pl. 56.1 ¶ 23.
39 *See id.* ¶ 24.
40 *See* Declaration of Emile B. Maalouf in Support of Plaintiff'sOpposition to Defendant's Motion for Summary Judgment ("Maalouf Decl.") ¶ 11; RAO Gazprom Term Sheet, Ex. 1 to Maalouf Decl., SSB 00390.
41 *See* Pl. 56.1 ¶ 20.
42 *See id.* ¶ 21.

term of the Circumvention Agreement and continuing to the present."[43] Maalouf seeks damages for this breach "based upon the understanding of a discounted fee at a minimum of 0.5% of total Capital raised = $6 million."[44]

Gazprom was not one of the three parties explicitly listed in the May 1995 Agreement. However, Maalouf contends that Gazprom was an "affiliate" of the Listed Party Rosneft, and therefore covered by the May 1995 Agreement.[45] Maalouf also claims that, on August 7, 1996, shortly before the meeting Maalouf arranged between Smith Barney and Gazprom, Tabet orally promised that Gazprom would be subject to the same non-circumvention constraints as the Listed Parties.[46] Tabet has denied making any such statement.[47]

3. The "RAIB Transaction"

In 1996, the Russian-American Investment Bank ("RAIB") acted as an advisor to Alrosa in obtaining a $62 million loan guaranteed by the Ex-Im Bank.[48] Smith Barney holds an interest in RAIB: Smith Barney describes its interest as an "indirect minority interest," while Maalouf contends that "it is not clear what the ownership percentage was."[49] Maalouf alleges that Smith Barney "breached the

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43 Compl. ¶ 23.

44 Maalouf Interrogatory Response No. 2, Ex. 9 to Declaration of Boaz S. Morag, defendant's counsel, in Support of Defendant's Motion for Summary Judgment ("Morag Decl.").

45 Compl. ¶¶ 11-12.

46 *See id.* ¶ 19. *See also* Deposition of Emile B. Maalouf ("Maalouf Dep."), Ex. 2 to Morag Decl., at 109:7 - 110:20.

47 *See* Deposition of Kamal Tabet, Ex. 3 to Morag Decl., at 42:22-43:8.Tabet testified that he told Maalouf, "The list, is the list. We will not change the list. If you want to set up a meeting for me to go to meet them, I am happy to do it. And then, after the meeting, if things go well, we can talk about expanding it."

48 *See* Pl. 56.1 ¶ 30.

49 Def. 56.1 ¶ 32; Pl. 56.1 ¶ 32.

agreements by secretly dealing directly with Listed Party [Alrosa] . . . through the [Smith Barney] affiliate [RAIB]."[50]

III. LEGAL STANDARD

Summary judgment is appropriate if the evidence of record "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "An issue of fact is genuine 'if the evidence is such that a jury could return a verdict for the nonmoving party.'"[51] "A fact is material for these purposes if it 'might affect the outcome of the suit under the governing law.'"[52]

The movant has the burden of demonstrating that no genuine issue of material fact exists.[53] In turn, to defeat a motion for summary judgment, the non-moving party must raise a genuine issue of material fact. To do so, it "must do more than simply show that there is some metaphysical doubt as to the material facts,"[54] and it must "come forward with 'specific facts showing that there is a genuine issue for trial.'"[55] In determining whether a genuine issue of material fact exists, the court must construe the evidence in the light most favorable to the non-moving party and draw all inferences in that party's favor.[56] However, "[w]hile all

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50 Compl. ¶ 21.

51 *Overton v. New York State Div. of Military and Naval Affairs*, 373 F.3d 83, 89 (2d Cir. 2004) (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 248(1986)).

52 *Id.* (quoting *Anderson*, 477 U.S. at 248).

53 *See Powell v. Nat'l Bd. of Medical Examiners*, 364 F.3d 79, 84 (2d Cir. 2004).

54 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

55 *Powell*, 364 F.3d at 84 (quoting *Aslanidis v. United States Lines, Inc.*, 7 F.3d 1067, 1072 (2d Cir. 1993)).

56 *See Williams v. R.H. Donnelley, Corp.*, 368 F.3d 123, 126 (2d Cir. 2004).

factual ambiguities must be resolved in favor of the nonmoving party, the nonmoving party may not rely on conclusory allegations or unsubstantiated speculation."[57]

Pro se parties are entitled to "extra consideration" on summary judgment motions.[58] However, "[p]roceeding pro se does not otherwise relieve a litigant from the usual requirements of summary judgment, and a pro se party's 'bald assertion,' unsupported by evidence, is not sufficient to overcome a motion for summary judgment."[59]

IV. DISCUSSION

A. Breach of Contract and Breach of the Covenant of Good Faith

Maalouf asserts claims for breach of contract, "implied contract in fact," and breach of the covenant of good faith and fair dealing. Maalouf's claims for breach of the covenant of good faith and fair dealing, and "implied contract in fact," are entirely duplicative of his claim for breach of contract, and must be dismissed.[60] The remainder of this section analyzes Maalouf's claims for breach of contract with regard to Smith Barney's three alleged breaches.

1. The Alrosa Busted Transaction

Smith Barney does not dispute that Alrosa was a Listed Party, and that Smith Barney worked on a Eurobond transaction for Alrosa during the term of the May 1995 Agreement. There is certainly a genuine issue as to whether

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57 *itsu Ltd. v. Federal Express Corp.*, 247 F.3d 423, 428 (2d Cir. 2001) (quotation omitted).

58 *Salahuddin v. Coughlin*, 999 F. Supp. 526, 535 (S.D.N.Y. 1998).

59 *Cole v. Artuz*, No. 93 Civ. 5981, 1999 WL 983876, at *3 (S.D.N.Y. Oct. 28, 1999).

60 *See Union Carbide Corp. v. Montell, N.V.*, 944 F. Supp. 1119, 1136 (S.D.N.Y. 1996).

Smith Barney breached the May 1995 Agreement. However, the only damages that Maalouf could obtain for such a breach would be compensation Smith Barney received for the transaction but failed to share with Maalouf. In fact, it is undisputed that Smith Barney received no compensation from the Alrosa Busted Transaction.

Maalouf argues that he is entitled to damages based on the amount of the busted transaction and "the $3bln. of future business lost."[61] But Smith Barney was under no obligation to complete any transaction with any Listed Party: Smith Barney's only obligations were to maintain the confidentiality of CIN's information, refrain from dealing with a Listed Party without CIN's permission, and to pay CIN reasonable compensation in the event that a transaction was completed. Maalouf's claims for consequential damages for, *inter alia*, "loss of credit and reputation . . . anxiety and anguish [and] loss of health and wellbeing,"[62] are entirely speculative and have not been shown to be within the contemplation of the parties. As a result, such damages are not recoverable as a matter of law.

Maalouf is therefore limited to nominal damages for Smith Barney's alleged breach.[63] Where a defendant's liability is limited to a certain amount, courts may grant

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61 Plaintiff's Memorandum of Law in Opposition to Motion for Summary Judgment ("Pl. Mem.") at 4.

62 *Id.* at 9.

63 "[F]ailure of proof of damages does not justify the dismissal of a claim for breach of contract, as it does most tort claims. The victim of a breach of contract is always entitled to nominal damages if he proves a breach but no damages." *Olympia Hotels Corp. v. Johnson Wax Dev. Corp.*, 908 F.2d 1363, 1373 (7th Cir. 1990). *See also Chronister Oil Co. v. Unocal Ref. & Mktg.*, 34 F.3d 462, 466 (7th Cir. 1994) (awarding nominal damages, "to which for reasons we do not understand every victim of a breach of contract, unlike a tort victim, is entitled.").

summary judgment limiting damages to that amount.[64] Smith Barney's motion for summary judgment limiting Maalouf's potential recovery with regard to the Alrosa Transaction to nominal damages of one dollar is granted.[65]

2. The Gazprom Transaction

Maalouf's claim that the Gazprom Transaction breached the parties' agreements depends on his being able to show that Gazprom was covered by the May 1995 Agreement. Maalouf claims that, on August 7, 1996, Tabet orally promised that Gazprom:

> would have the same protection under the May 10 as the listed party in the May 10, 1995 Agreement . . . Meaning my rights and interests would be protected, that I would not be circumvented, and that . . . Smith Barney's obligation to myself would be paid at the time of closing . . . any business with Gazprom . . . If there was any dealing during the terms of the May 10, 1995 Agreement.[66]

Smith Barney contends that Maalouf's reliance on this alleged oral agreement is barred by the terms of the May 1995 and June 1996 Agreements, both of which preclude oral modifications. Smith Barney cites New York law to

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64 *See, e.g., Clark v. Meyer,* 188 F. Supp. 2d 416, 424 (S.D.N.Y. 2002) (granting summary judgment limiting plaintiff's recovery for breach of contract to $8,000, where plaintiff had failed to come forward with admissible evidence showing that loss could exceed that amount).

65 One dollar is the standard measure of nominal damages. "Even if the breach caused no loss . . . the injured party can recover as damages a nominal sum, commonly six cents or a dollar, fixed without regard to loss." Allen E. Farnsworth, Farnsworth on Contracts §12.8 (2d ed. 1998).

66 Maalouf Dep. at 109:7 - 110:20.

this effect.[67] Smith Barney's reliance on New York law is misplaced: Illinois law governs this issue.

A federal court sitting in diversity must apply the choice of law rules of the forum state, in this case New York.[68] New York gives effect to choice of law clauses, absent fraud or violation of public policy, so long as the state selected has sufficient contacts with the transaction.[69] The May 1995 Agreement contains an Illinois choice of law clause, while the June 1996 Agreement contains a New York choice of law clause. Because CIN was an Illinois partnership and Smith Barney is a New York corporation, both states have sufficient connections to the transaction, and so both clauses are enforceable. The June 1996 Agreement specifically states that it does not supersede the May 1995 Agreement, so the later clause cannot supersede the earlier clause. Each clause must therefore be treated as effective with regard to the contract to which it pertains. Maalouf alleges that Tabet's promise modified the May 1995 Agreement, adding to that Agreement's Listed Parties. Whether the May 1995 Agreement can be modified by such a promise is determined by Illinois law.[70]

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67 Smith Barney notes that, in its previous opinion, this Court determined that "New York substantive law governs the claims in issue here." *Maalouf v. Salomon Smith Barney, Inc.*, No. 02 Civ. 4770, 2003 WL 1858153, at*3 n.4 (S.D.N.Y. Apr. 10, 2003). Maalouf's contract claims, however, were not at issue in that opinion. That opinion determined that New York law was applicable to all other claims at issue here.

68 *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 497 (1941).

69 *See Hartford Fire Ins. Co. v. Orient Overseas Containers Lines (UK) Ltd.*, 230 F.3d 549, 556 (2d Cir. 2000).

70 It is unlikely that these two contracts could be seen as a single agreement, given the length of time between the two. *See Williams v. Mobil Oil Corp.*, 83 A.D.2d 434, 439 (2d Dep't 1981) ("Generally, the rule is that separate contracts relating to the same subject matter and executed simultaneously by the same parties may be construed as one agreement."). But even if the two contracts are construed as a single

Under Illinois law, Tabet's alleged promise might have had the effect of modifying the May 1995 Agreement. "Oral modifications of contracts not involving the sale of goods . . . are enforceable under the common law of Illinois."[71] Smith Barney's reliance on the clauses barring oral modification is unavailing. "It is settled law in Illinois that, except for agreements concerning the sale of goods, parties may modify contracts orally after including a contract provision that precludes oral modification."[72] Because there is a genuine issue of material fact as to whether the May 1995 Agreement was orally modified to cover Gazprom, Maalouf's claim for breach of contract with regard to the Gazprom Transaction cannot be dismissed at this stage.

However, even if Maalouf can show that the May 1995 Agreement was modified, and that Smith Barney's dealings with Gazprom in 1997 therefore breached the agreement, he cannot show that he is entitled to damages. The only transactions ever consummated between Smith Barney and Gazprom occured in 2002, four years after the expiration of the May 1995 Agreement and six years after the expiration of the June 1996 Agreement. Whether the issue is analyzed

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agreement, the outcome is the same. According to general rules of contract interpretation, "an interpretation that gives a reasonable and effective meaning to all terms of a contract is preferable to one that leaves a portion of the writing useless or inexplicable." *Hartford,* 230 F.3d at 556 (construing conflicting choice of law clauses in single contract so that each clause applied to a different phase of the transaction). If the two contracts are read together, the natural interpretation of the two clauses is that the Illinois clause applies to disputes arising out of the subject matter of the May 1995 Agreement, Smith Barney's non-circumvention obligations with regard to the Listed Parties.

71 *Monarch Coaches, Inc. v. ITT Industrial Credit,* 818 F.2d 11, 12 (7th Cir. 1987).

72 *Williams v. Jader Fuel Co.,* 944 F.2d 1388, 1395 (7th Cir. 1991)

under Illinois law, applicable to the May 1995 Agreement (which fixed Smith Barney's non-circumvention obligations), or New York law, applicable to the June 1996 Agreement (which fixed Maalouf's compensation), Maalouf had no right to compensation for transactions occurring after the expiration of the agreements.

Under Illinois law, "a [broker] may be entitled to commissions made after the termination of employment if that [broker] procured the sales through its activities prior to termination." The broker must show that the sale was "all but consummated" prior to termination.[73] Maalouf has failed to come forward with any facts that might suggest that the 2002 transactions were 'all but consummated' prior to the expiration of his agreements with Smith Barney. The result is the same if the issue is analyzed under New York law, applicable to the June 1996 Agreement. The general rule in New York is that, absent an express contractual right to ongoing commissions, a "broker is not entitled to a commission on a sale negotiated after the term of his employment, even though the sale is negotiated with a buyer introduced to the seller by the broker."[74] A broker may be entitled to commissions on such transactions only if he can show that his actions brought the parties together on the essential terms of the transaction during the period of his employment, and the termination of his employment was a bad faith effort to avoid payment of his commission.[75]

Consequently, Maalouf can recover at most nominal damages for Smith Barney's alleged breach. Smith Barney's motion for summary judgment limiting Maalouf's

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73 *Heuvelman v. Triplett Electrical Instrument Co.*, 23 Ill. App. 2d 231, 238 (Ct. App. Ill. 1959).

74 *Air Support Int'l, Inc. v. Atlas Air, Inc.*, 54 F. Supp. 2d 158, 167 (E.D.N.Y. 1999).

75 *See id.*

potential recovery for any breach connected with the Gazprom Transaction to nominal damages is granted.

3. The RAIB Transaction

Maalouf alleges that Smith Barney breached the May 1995 Agreement by causing RAIB, as Smith Barney's representative, to deal with Alrosa during the period of the agreement. Maalouf has failed to come forward with any evidence to support this claim. Maalouf's only evidence is that Smith Barney owned an indirect minority interest in RAIB (as did Alrosa).[76] Maalouf does not present any evidence that Smith Barney controlled RAIB, with respect to this transaction or any other. Maalouf does not allege that Smith Barney received any fee for RAIB's transaction with Alrosa. Because no reasonable jury could infer from the evidence presented that RAIB was acting as Smith Barney's representative, Maalouf's claims for breach of contract with regard to the RAIB Transaction are dismissed.

E. Unjust Enrichment

Maalouf also seeks to recover under a theory of unjust enrichment, alleging that Smith Barney has been

> unjustly enriched to the detriment of CIN by [Smith Barney's] receipt and exploitation of the Confidential Information, of CIN's valuable services in introducing and vouching for [Smith Barney] to senior Russian executives and government officials, and of the proceeds of the [Alrosa Busted, Gazprom and RAIBTransactions].[77]

The "essence" of an unjust enrichment claim "is that one party has received money or a benefit at the expense of

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76 *See* Pl. 56.1 ¶¶ 32-33.

77 Compl. ¶ 53.

another."[78] Maalouf cannot show that Smith Barney was unjustly enriched at his expense by its receipt of CIN's services and information: CIN and Smith Barney explicitly contracted for CIN to provide its services and information, in return for compensation to be paid *if* Smith Barney closed a transaction with one of the listed parties within the period of the contract. Nor can Maalouf show that Smith Barney was unjustly enriched at his expense by the 2002 Gazprom Transaction. He fails to present evidence that he was responsible for the retention of Smith Barney for that transaction; indeed, he concedes that he had no contact with Gazprom after early 1997.[79] Finally, Maalouf has failed to present evidence that Smith Barney was involved in any way with the RAIB Transaction. Smith Barney's motion for summary judgment dismissing Maalouf's unjust enrichment claim is therefore granted.

D. Tortious Interference Claims

As noted, Maalouf has presented evidence that CIN had contractual and business relationships with various Russian enterprises.[80] Maalouf contends that Smith Barney's alleged breaches of the agreements between CIN and Smith Barney "eliminated CIN's participation in future business development activities in Russia and elsewhere, and severely limited its exposure to Rosneft, [Alrosa], and Gazprom."[81] On the basis of this conduct, Maalouf asserts claims for tortious interference with prospective business relations and tortious interference with contract.

Smith Barney asserts that New York law governs these claims. The applicable law is determined by New York's choice of law rules.[82] In tort actions, "New York applies the

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78 *Kaye v. Grossman*, 202 F.3d 611, 616 (2d Cir. 2000).
79 *See* Pl. 56.1 ¶ 19.
80 *See supra* n. 3.
81 Compl. ¶ 26.
82 *See Klaxon*, 313 U.S. at 497.

law of the state with the most significant interest in the dispute."[83] The two states with significant interests in the dispute are Illinois and New York. CIN is a defunct Illinois partnership. Smith Barney is a New York corporation. The dispute arises out of a business relationship governed by contracts that contain Illinois and New York choice of law clauses respectively. Because there is no material conflict between Illinois and New York law, on either claim, the Court will apply New York law.[84]

The elements of a claim for tortious interference with prospective business relations are "(1) a business relationship between plaintiff and a third party; (2) defendant's knowledge of such relationship; (3) intent to interfere; (4) defendant acted with the sole purpose of harming plaintiff or used dishonest, unfair or improper means; and (5) the relationship is injured."[85] To recover on a theory of tortious interference with prospective business relations, Maalouf must show the existence of a business relationship. Maalouf has adduced evidence of business relationships between CIN and Alrosa, and CIN and Rosneft.[86] However, he has adduced no evidence of any pre-existing business relationship with Gazprom.[87] With respect to Rosneft, Maalouf has offered no evidence that Smith Barney interfered, in any way, with that relationship. Thus, the only remaining basis for Maalouf's claim must be

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83 *Lee v. Bankers Trust Company*, 166 F.3d 540, 545 (2d Cir. 1999).

84 *See IBM v. Liberty Mut. Ins. Co.*, 363 F.3d 137, 143 (2d Cir.2004) ("In the absence of substantive difference . . . a New York court will dispense with choice of law analysis; and if New York law is among the relevant choices, New York courts are free to apply it.").

85 *Nadel v. Play-by-Play Toys & Novelties, Inc.*, 208 F.3d 368, 382 (2d Cir. 2000).

86 *See* Nov. 23 Agreement.

87 *See* Pl. 56.1 ¶ 22.

that Smith Barney tortiously interfered with his relationship with Alrosa, by breaching the May 1995 Agreement with CIN to enter into a transaction with Alrosa.

To recover, Maalouf must allege that he was "actually and wrongfully prevented from entering into or continuing in a *specific* business relationship."[88] Maalouf cannot satisfy this requirement. The only specific business relationship that Smith Barney may have prevented him from entering into was the Alrosa Busted Transaction. Maalouf has presented no argument or evidence that Smith Barney's transaction with Alrosa affected CIN's representation of Alrosa with respect to any of Alrosa's other business. The Alrosa Busted Transaction between Smith Barney and Alrosa in fact failed, for reasons beyond Maalouf's control. Because Maalouf cannot show any injury, his claim for tortious interference with a prospective business relationship fails.

The foregoing analysis applies equally to his claim for tortious interference with contract. It is possible that Alrosa breached Almazy-Yakutii's exclusive representation contract with CIN by dealing with Smith Barney.[89] However, "to maintain a claim for tortious interference with contractual relations, a plaintiff must establish damages."[90] Maalouf cannot show damages from the loss

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88 *Solar Travel Corp. v. Nachtomi*, No. 00 Civ. 3564, 2001 WL 641151, at *10 (S.D.N.Y. June 8, 2001) (quotation omitted, emphasis in original).

89 This would, of course, depend on the relationship between Almazy Yakutii and Alrosa, which is not altogether clear at this stage.

90 *Net2globe Int'l v. Time Warner Telecom of N.Y.*, 273 F. Supp. 2d 436, 463 (S.D.N.Y. 2003). *Accord Burrell v. City of Matoon*, 378 F.3d 642 (7th Cir. 2004) (holding that damages are an element of a claim for tortious interference with contract or with prospective business advantage under Illinois law).

of the Alrosa Busted Transaction, and his other claims for damages are entirely speculative. Smith Barney's motion for summary judgment dismissing Maalouf's tort claims is granted.

E. Breach of Fiduciary Duty

In order to pursue a breach of fiduciary duty claim, there must be a fiduciary relationship between the parties.[91] Entering into a conventional business relationship ordinarily does not create a fiduciary relationship.[92] "[A]n arm'slength business transaction, even those where one party has superior bargaining power[,] is not enough to give rise to a fiduciary relationship."[93] Maalouf offers only conclusory allegations that Smith Barney and CIN had anything other than a conventional business relationship. Smith Barney's motion for summary judgment dismissing Maalouf's claim for breach of fiduciary duty is therefore granted.

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91 *See Whitney v. Citibank, N.A.*, 782 F.2d 1106, 1115 (2d Cir. 1986).

92 *See Reuben H. Donnelly Corp. v. Mark I. Mktg. Corp.*, 893 F. Supp. 285, 289 (S.D.N.Y. 1995).

93 *Sony Music Entm't Inc. v. Robison*, No. 01 Civ. 6415, 2002 WL 272406, at *3 (S.D.N.Y. Feb. 25, 2002). *Accord Pro Football Weekly, Inc. v. Gannett Co.*, 988 F.2d 723, 727 (7th Cir. 1992) (holding that arm's-length relationship between businesses does not give rise to fiduciary duty under Illinois law).

V. CONCLUSION

For the foregoing reasons, Smith Barney's motion for summary judgment dismissing Maalouf's claims is granted with respect to all claims other than breach of contract, and with respect to the claim for breach of contract arising out of the RAIB Transaction. Smith Barney's motion for summary judgment limiting Maalouf's recovery to nominal damages is granted with respect to the remaining claims for breach of contract.[94] Maalouf is precluded from offering evidence of damages. The Clerk of the Court is directed to close this motion (docket # 48). A conference is scheduled for September 23, 2004 at 4:30.

SO ORDERED:

By "s/Shira A. Scheindlin"
Shira A. Scheindlin
U.S.D.J.

Dated: New York, New York
September 7, 2004

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94 Although the effect of this order is to reduce the amount Maalouf can recover to below the jurisdictional minimum, the court retains jurisdiction. While Maalouf has failed to come forward with evidence showing that he is entitled to recover more than nominal damages, it is not possible to say that the face of Maalouf's complaint was "so patently deficient as to reflect to a legal certainty that he could not recover the amount alleged, or that the damages alleged were feigned to satisfy jurisdictional minimums." *Wolde-Meskel v. Vocational Instruction Project Community Servs., Inc.*, 166 F.3d 59, 63 (2d Cir. 1999). It is possible, for example, that Maalouf might have adduced evidence showing that RAIB was a representative of Smith Barney.

- Appearances -

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S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

EMILE B. MAALOUF, d/b/a CHICAGO INTERNATIONAL NETWORK,

Plaintiff,

v.

JUDGMENT

02 Civ. 4770 (SAS)

CITIGROUP GLOBAL MARKETS, INC.
f/k/a SALOMON SMITH BARNEY, INC.
a/k/a SMITH BARNEY, INC.
a/k/a SMITH BARNEY,

Defendant.
----------X

WHEREAS, this action came on for summary judgment before the Court, Honorable Shira A. Scheindlin, District Judge, presiding, and the issues were duly heard;

WHEREAS, plaintiff Emile B. Maalouf d/b/a/ Chicago International Network ("Maalouf") appeared pro se, and defendant Citigroup Global Markets, Inc. ("Citigroup") appeared through its attorney;

WHEREAS, AFTER DUE DELIBERATION BY THE Court, a decision was duly rendered by its Order dated September 7, 2004 (the "September 7 Order"), granting summary judgment in favor of Citigroup dismissing with prejudice all claims other than breach of contract and with respect to the claim for breach of contract arising out of the RAIB Transaction and limiting Plaintiff's recovery to nominal damages with respect to the two remaining claims for breach of contract;

WHEREAS, at a conference on September 23, 2004, Citigroup consented to entry of a judgment in accordance with the terms of the September 7 Order; and

WHEREAS, Citigroup's consent to the entry of this judgment shall not br deemed an admission of its liability with respect to any claim and Citigroup reserves the right to challenge any issue of liability or damages should the Court's September 7 Order be modified on appeal; and

WHEREAS, Plaintiff reserves the right to appeal any aspect of the Court's September 7 Order;

It is ORDERED, ADJUDGED AND DECREED that defendant's motion for summary judgment is granted dismissing with prejudice all claims other than the breach of contract and the claim for breach of contract arising out of the RAIB Transaction; and

It is further ORDERED, ADJUDGED and DECREED that Maalouf recover of Citigroup on his remaining claims of breach of contract the sum of $2.00, plus statutory pre-judgment interest, plus applicable costs and disbursements in this action as provided for under Fed. R. Civ. P. 54(d)(1) and Local Civil Rule 54.1(c).

Dated at New York, New York, this 18th day of October, 2004.

By "s/Shira A. Scheindlin"
Shira A. Scheindlin, U.S.D.J.

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON 10/21/04
Clerk of Court